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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID MENDOZA,

Defendant and Appellant.

E069292

(Super.Ct.No. INF1601604)

OPINION

APPEAL from the Superior Court of Riverside County. Otis Sterling III, Judge.

Affirmed with directions.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Michael D. Butera, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant David Mendoza is serving a second strike sentence of 13 years resulting from a domestic violence incident. He argues the matter should be remanded for resentencing because the trial court misunderstood its discretion to strike the prior conviction allegations. As discussed *post*, the court correctly described its limited discretion, given the state of the law, the existence of the strike prior because of defendant's choice to join a criminal street gang, defendant's extensive criminal history, and his regular violations of both parole and probation.

After our original opinion in this case was filed, defendant filed a petition for rehearing, which this court granted in light of Senate Bill No. 1393 (Stats. 2018, ch. 1013) (S.B. 1393). S.B. 1393 amended sections 667, subdivision (a), and 1385, subdivision (b), effective January 1, 2019, to give courts discretion to dismiss or strike prior serious felony convictions that previously were mandatorily imposed.

We will order remand to the trial court for it to exercise its discretion to strike or impose the section 667, subdivision (a) serious prior felony conviction. In all other respects, the judgment is affirmed.

FACTS AND PROCEDURE

Defendant and his girlfriend (the victim) had two children together, ages two and four. They lived at the home of defendant's grandparents and had been together about five years. On October 10, 2016, the victim called 911 to say that defendant had hit her and she asked to have the police come to the home. The victim and defendant had gotten into an argument because defendant wanted to leave with a friend, and the victim did not want him to because defendant usually used drugs around his friends. The victim told the

responding officer that defendant had hit her about 20 times, including on her nose. The victim told a similar story to the 911 operator, hospital staff, and her mother. The victim's nose was bleeding and she was coughing up blood. Hospital staff told her that her nose was broken, but that it would be worse to fix it than to leave it alone. The victim's nose hurt "pretty bad" and continue to hurt for about a week. She received treatment at the hospital for facial trauma and a nasal bone fracture.

On August 14, 2017, the People filed a first amended information charging defendant in count 1 with inflicting corporal injury on a cohabitant resulting in a traumatic condition (Pen. Code, § 273.5, subd. (f)(1)),¹ in count 2 with misdemeanor violating a protective order (§ 273.6, subd. (b)), and in count 3 with felony vandalism (§ 594, subd. (a)). Regarding count 1, the People alleged defendant personally inflicted great bodily injury (§§ 12022.7, subd. (e), 1192.7, subd. (c)(8)). The People also alleged defendant had a prior strike conviction (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)), a prior serious felony conviction (§ 667, subd. (a)), and two prior prison term convictions (§667.5, subd. (b)).

Also on August 14, 2017, defendant pled guilty to counts 2 and 3 as misdemeanors.

The victim testified at trial that defendant had not hit her and that she did not want anything to happen to him because he was the father of her children. The jury heard testimony from the responding officer, a recording of the 911 call, and saw a video

¹ Section references are to the Penal Code except where otherwise indicated.

recording of the responding officer's interaction with the victim. On August 16, 2017, the jury convicted defendant of count 1 and found true the enhancement for great bodily injury.

Also on August 16, 2017, the court found true the prior conviction allegations. Defendant's relevant prior convictions are as follows: In 2012, defendant was convicted of felony driving or taking a vehicle (Veh. Code, § 10851, subd. (a)), fleeing from an officer with wanton disregard for safety (Veh. Code, § 2800.2), and felony participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)). This conviction serves as the basis for the strike prior, the serious felony prior, and the second prison term prior. In 2011, defendant was convicted of carrying a concealed weapon (former § 12025, subd. (b)(3)) and misdemeanor participation in a criminal street gang, which served as the first prison term prior.

Defendant was sentenced on October 6, 2017. The People requested the maximum sentence of 23 years four months. The defense requested the minimum sentence of 13 years. After hearing argument from counsel, the court sentenced defendant to 13 years in prison as follows: the low term of two years for the corporal injury conviction, doubled to four years for the strike prior, plus the low term of three years for the great bodily injury allegation, plus five years for the serious felony prior, plus one year for one of the prison term priors. The court imposed concurrent one-year sentences for counts 2 and 3 and stayed the one-year enhancement for the second prison term prior.

This appeal followed.

DISCUSSION

The Contentions

Defendant argues that the trial court's comments at sentencing indicate it misapprehended its authority under section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). Defendant contends the court believed it had no discretion to strike defendant's strike prior and his prison term prior, which would have allowed it to impose probation as an alternative to the 13-year prison sentence. The People disagree, arguing the court is entitled to the presumption that it understood and applied the law correctly in sentencing, and the record does not demonstrate that the court was unaware of its ability to consider striking appellant's prior serious felony conviction, as opposed to merely declining to do so.

The Relevant Proceedings

At the sentencing hearing, the People asked the court to impose the maximum sentence of 23 years four months. The People based this on the numerous aggravating factors set forth in the probation report, the defendant's unwillingness to change, and the danger he posed to the community. The court then heard statements of support for defendant from three relatives and from the victim herself. The court heard briefly from defendant, and then engaged him in an exchange about what defendant would do for his children and the fateful choice, for sentencing purposes, he made to join a street gang. The court indicated it received letters of support for defendant from six people.

In explaining the basis for the sentence, the court emphasized that defendant's 2012 conviction for driving or taking a vehicle was relatively nonserious, but became a

strike because defendant was found to have committed the offense for the benefit of a criminal street gang. “Here’s the thing that makes this case very difficult for me and tragic [¶] . . . [¶] what’s making your case difficult is your decision to join a gang and be around gang members. And that decision, I’m just telling you, that decision has boxed you into a corner here today. It has literally put you in a position where I—I have very little discretion. I’ve got some discretion, but I’ve got very little discretion. Because . . . the underlying felony that you were convicted of, which was a [Vehicle Code section] 10851, but it was an allegation you did that as a gang member, that makes that a strike. And because of that, I can’t consider probation for your case. And because of that, I have to double the punishment I give you.”

Finally, the court found that certain aggravating factors did not apply, such as use of a weapon or firearm, sophistication, or planning. The court disagreed with the probation report’s finding that no mitigating factors applied, finding instead that defendant was remorseful, that he did not initiate the conflict, that defendant’s drug problem “significantly reduced his culpability [for] the crime,” and that a long period of incarceration would negatively affect his two children. The court agreed with the defense and chose to impose the low term because it found the mitigating factors outweighed the aggravating factors.

As part of the discussion of mitigating factors noted *ante*, the court lamented that defendant’s choice to join a gang ruled out the option to impose probation. “If it weren’t for your strike offense, if it weren’t for the fact that you are a participant in a gang and didn’t have that strike offense, if it were not for that, I would consider you for probation.

But that strike offense and that criminal gang activity has boxed you into a corner, as I said, so I'm looking at this in mitigation. [¶] I would have loved to have considered probation in your case because of all the wonderful things that have been said about you here today. But because of that conviction I can't do it."

The Law

Section 1385, subdivision (a), authorizes a trial court to strike prior conviction allegations and/or findings in cases brought under the three strikes law. (*Romero, supra*, 13 Cal.4th at pp. 529-530.) However, a "court's discretion to strike prior felony conviction allegations in furtherance of justice is limited." (*Id.* at p. 530.) "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385[, subdivision] (a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

" 'Defendants are entitled to "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion.' (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228[(Brown)], quoting *People v. Belmontes* (1983) 34 Cal.3d

335, 348, fn. 8.)” (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1421; see *People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1247 [“An erroneous understanding by the trial court of its discretionary power is not a true exercise of discretion”].) “Therefore, when the record indicates the court misunderstood or was unaware of the scope of its discretionary powers, we should remand to allow the court to properly exercise its discretion.” (*Bolian*, at p. 1421; see *Romero, supra*, 13 Cal.4th at p. 530, fn. 13.)

“Remand for resentencing is not required, however, if the record demonstrates the trial court was aware of its sentencing discretion. [Citations.] . . . “[A] trial court is presumed to have been aware of and followed the applicable law.” [Citations.]’ [Citation.]” (*Brown, supra*, 147 Cal.App.4th at pp. 1228-1229.) “[I]t is the appellant’s burden to affirmatively demonstrate error. [Citation.]” (*People v. Cardenas* (2015) 239 Cal.App.4th 220, 227.)

*Analysis*²

Here, the court agonized about sentencing defendant to prison for 13 years and clearly wished it could give him less time than that presumed minimum, or even probation. However, the court accurately acknowledged the high bar required to justify striking a strike conviction when it told defendant, “I have very little discretion. I’ve got some discretion, but I’ve got very little discretion.” Rather than affirmatively demonstrating that it believed it had no discretion at all to strike defendant’s strike prior,

² As the People point out, defendant does not describe where the record indicates the court misunderstood its discretion to strike the one-year prison enhancement, and therefore defendant has not met his burden on appeal to establish error on that point.

the court recognized that its discretion was limited, both by case law and by defendant's criminal history, including gang membership, an extensive criminal record as a juvenile and an adult, and by his numerous and regular violations of parole and probation. Given defendant's extensive criminal history, the court simply could not exercise its limited discretion to find that defendant "may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams, supra*, 17 Cal.4th at p. 161.) As the court explained, defendant had "boxed [himself] into a corner" when he joined a gang, thereby transforming the 2012 felony vehicle theft into a strike conviction. The court railed against, but accurately described, the legal limits on its discretion to strike defendant's strike prior. We find no error.

S.B. 1393

Effective January 1, 2019, sections 667, subdivision (a), and 1385, subdivision (b), allow a trial court to exercise discretion to strike or dismiss a prior *serious* felony conviction for sentencing purposes. Under the prior versions of these statutes, the court was *required* to impose a five-year consecutive term for section 667, subdivision (a) prior convictions and had no discretion to strike any prior conviction of a serious felony for purposes of enhancement of a sentence. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.

The parties and this court agree that S.B. 1393 applies retroactively to this case because it was not yet final when the amendments to sections 667, subdivision (a), and

1385, subdivision (b), became effective on January 1, 2019. Remand for resentencing is warranted.

DISPOSITION

The matter is remanded to the trial court with directions to exercise its discretion regarding whether to resentence defendant pursuant to sections 667, subdivision (a), and 1385, subdivision (b), as amended by S.B. 1393. In all other respects, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

FIELDS
J.

RAPHAEL
J.